Rashidah bte Mohammad v Mayban Finance Bhd

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO 22–796 OF 2002
MOHD HISHAMUDIN J
7 APRIL 2003

Civil Procedure *— Transfer of action — From one High Court to another — Whether High Court has power to grant application for transfer — Courts of Judicature Act 1964 Schedule para 12*

The plaintiff had filed an action against the defendant for the tort of malicious prosecution. The cause of action was based on the following averments. The defendant had commenced bankruptcy proceedings in the High Court of Kuala Terengganu against the plaintiff. The plaintiff had no knowledge of the proceedings. In the absence of the plaintiff, the defendant obtained a receiving and adjudicating order against the plaintiff. The order was advertised in the *Gazette* as well as in the local newspapers. The plaintiff came to know of the order only when she received a letter from the Official Assignee directing her to present herself at the office of the Official Assignee. The plaintiff applied to the court and was successful in setting aside the bankruptcy order without any objection from the defendant. The plaintiff alleged that the action in bankruptcy that was taken against her by the defendant was done in bad faith and an abuse of the process of court. The defendant applied for the transfer of the suit from the High Court of Kuala Lumpur to the High Court of Kuala Terengganu.

Held, allowing the application:

By virtue of para 12 of the Schedule of the Courts of Judicature Act 1964, the court had the power to grant the application to transfer the proceeding to the High Court of Kuala Terengganu, regardless of the fact that, other than the Rules of the High Court 1980, there are presently no rules of court regulating the exercise of such power. Paragraph 12 is a simple, clear and straightforward provision: a High Court is empowered to transfer a proceeding to any other High Court, and the exercise of such power to transfer the proceeding is only subject to the rules of court, if there are any such rules. What the proviso means is that if there are rules of court in existence regulating the exercise of the power conferred by paragraph 12, then, the exercise of the power must be in accordance with such rules. The proviso does not say, nor can it be implied, that if there are no such rules then the power cannot be exercised. The provisions of the Rules of the High Court 1980 are sufficient to regulate the exercise of such a power (see pp 533D–F, 534E); *Surinder Singh v Central Government & Ors* AIR [1986] SC 2166 and *Public Prosecutor v Seeralan* [1985] 2 MLJ 30 followed; *Malacca Securities Sdn Bhd v Loke Yu* [1999] 6 MLJ 112 not followed.

[Bahasa Malaysia summary

Plaintif telah memfailkan satu tindakan terhadap defendan kerana tort pendakwaan berniat jahat. Kausa tindakan adalah berdasarkan penegasan-penegasan berikut. Defendan telah memulakan prosiding kebankrapan di Mahkamah Tinggi Kuala Terengganu terhadap plaintif. Plaintif tiada pengetahuan tentang prosiding tersebut. Dengan ketiadaan plaintif, defendan telah memperolehi satu perintah penerimaan dan penghukuman terhadap plaintif. Perintah tersebut telah diiklankan dalam *Warta* dan juga dalam akhbar-akhbar harian. Plaintif hanya mengetahui tentang perintah tersebut apabila beliau menerima sepucuk surat daripada Pegawai Pemegang Harta yang mengarahkan beliau menghadirkan diri di pejabat Pegawai Pemegang Harta. Plaintif telah memohon kepada mahkamah dan berjaya mengenepikan perintah kebankrapan tanpa apa-apa bantahan daripada defendan. Plaintif telah mengatakan bahawa tindakan kebankrapan yang diambil terhadap beliau oleh defendan dibuat dengan niat jahat dan adalah satu penyalahgunaan mahkamah. Ini adalah permohonan oleh defendan untuk memindahkan guaman tersebut dari Mahkamah Tinggi Kuala Lumpur ke Mahkamah Tinggi Kuala Terengganu.

Diputuskan, membenarkan permohonan tersebut:

Menurut perenggan 12 Jadual kepada Akta Mahkamah Kehakiman 1964, mahkamah mempunyai kuasa untuk memberikan kuasa untuk memindahkan prosiding ke Mahkamah Tinggi Kuala Terengganu, walaupun pada hakikatnya, selain daripada Kaedah-Kaedah Mahkamah Tinggi 1980, tidak terdapat sekarang ini apa-apa kaedah-kaedah mahkamah yang mengawal penggunaan kuasa sedemikian. Perenggan 12 adalah satu peruntukan yang mudah, jelas dan terus terang: satu Mahkamah Tinggi diberi kuasa untuk memindahkan prosiding ke satu Mahkamah Tinggi yang lain, dan penggunaan kuasa sedemikian untuk memindahkan prosiding tersebut hanya tertakluk kepada kaedah-kaedah mahkamah, jika terdapat kaedah-kaedah sedemikian. Apa yang dimaksudkan oleh proviso tersebut hanyalah bahawa jika terdapat kaedah-kedah mahkamah yang ada mengawal penggunaan kuasa yang diberikan oleh perenggan 12, maka, penggunaan kuasa tersebut hendaklah bersesuaian dengan kaedah-kaedah tersebut. Proviso tersebut tidak menyatakan, maupun secara tersirat, bahawa jika tidak terdapat kaedah-kaedah sedemikian maka kuasa tersebut tidak boleh digunakan. Peruntukan-peruntukan Kaedah-Kaedah Mahkamah Tinggi 1980 adalah mencukupi untuk mengawal penggunaan kuasa sedemikian (lihat ms 533D–F, 534E); *Surinder Singh v Central Government & Ors* AIR [1986] SC 2166 dan *Public Prosecutor v Seeralan* [1985] 2 MLJ 30 diikut; *Malacca Securities Sdn Bhd v Loke Yu* [1999] 6 MLJ 112 tidak diikut.]

A **Notes**

For cases on transfer of action from one High Court to another, see 2 *Mallal's Digest* (4th Ed, 2001 Reissue) paras 6384–6386.

B **Cases referred to**

Amanah Finance Malaysia Bhd v Aura Vista Sdn Bhd & Ors [2000] 5 CLJ 229 (refd)

Malacca Securities Sdn Bhd v Loke Yu [1999] 6 MLJ 112 (not folld)

PP v Seeralan [1985] 2 MLJ 30 (folld)

Surinder Singh v Central Government & Ors 1986 AIR SC 2166 (folld)

C **Legislation referred to**

Courts of Judicature Act 1964 ss 16, 17, 25(2), Schedule, para 12

Rules of the High Court 1980

D *MS Ong* (*Chor Pee Anwarul & Co*) for the plaintiff.

Zamani Mohd (*Zamani Mohammad & Co*) for the defendant.

Mohd Hishamudin J: The plaintiff in this case has filed a writ action in this court (Court No 6, Commercial Division, High Court of Kuala Lumpur) against the defendant for the tort of malicious prosecution. The E cause of action is based on the following averments as set out in the statement of claim. In March 1998, the defendant commenced bankruptcy proceedings in the High Court of Kuala Terengganu against the plaintiff. The plaintiff had no knowledge of the proceedings. In September 1999, in the absence of the plaintiff, the defendant obtained a receiving and adjudicating order against the plaintiff. The order was advertised in the F *Gazette* as well as in the local newspapers. The plaintiff came to know of the order only when she received a letter from the Official Assignee directing her to present herself at the office of the Official Assignee. In February 2000, the plaintiff applied to the court and was successful in setting aside the bankruptcy order without any objection from the defendant. The G plaintiff alleges that the action in bankruptcy that was taken against her by the defendant was done in bad faith and an abuse of the process of court.

This enclosure (encl 12) that is now before me is an application by the defendant for the transfer of the suit from this court to the High Court of Kuala Terengganu.

H The ground advanced for the application is that the convenient forum is the High Court of Kuala Terengganu and not the High Court of Kuala Lumpur.

The reasons given by the defendant for contending that the High Court of Kuala Terengganu is the convenient forum are as follows:

I (a) the plaintiff has an address of service in Dungun, Terengganu;

(b) the defendant, a financial institution, has a branch office in Kuala Terengganu;

(c) the basis of the plaintiff's claim is that the defendant's bankruptcy proceedings against the plaintiff and such proceedings were instituted by the defendant in the High Court of Kuala Terengganu; and

(d) the witnesses that will be called by the defendant at the trial will be from Terengganu.

It is not disputed by the plaintiff that:

(a) the plaintiff has an address of service in Dungun, Terengganu;

(b) the defendant, a financial institution, has a branch office in Kuala Terengganu;

(c) the basis of the plaintiff's claim is the defendant's bankruptcy proceedings against the plaintiff which was instituted by the defendant in the High Court of KualaTerengganu; and

(d) the witnesses that will be called by the defendant at the trial will be from Terengganu.

The present application is made pursuant to s 25(2) and para 12 of the Schedule of the Courts of Judicature Act 1964.

Section 25(2) states:

> Powers of the High Court
>
> (1) ...
>
> (2) Without prejudice to the generality of subsection (1) the High Court shall have the additional powers set out in the Schedule:
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> Provided that all such powers shall be exercised in accordance with any written law or rules of court relating to the same.

Paragraph 12 of the Schedule states:

> Transfer of proceedings
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> Power to transfer any proceedings to any other Court or to or from any subordinate court, and in the case of transfer to or from a subordinate court to give any directions as to the further conduct thereof:
>
> Provided that this power shall be exercised in such manner as may be prescribed by any rules of court.

Although the phrase 'rules of court' in para 12 is not defined by the Act, nevertheless, it is clear that it refers to the rules of court made under s 16 of the Courts of Judicature Act 1964 by the Rules Committee established under s 17 of the same Act.

The plaintiff in opposing this application submits that this court, notwithstanding para 12 of the Schedule, has no power to grant the application. The learned counsel in his written submission refers to the proviso to para 12, which reads (to repeat):

> Provided that this power shall be exercised in such manner as may be prescribed by any rules of court.

The learned counsel argues that since, presently, there are no rules of court, therefore, this court cannot exercise the power under the said paragraph.

The learned counsel relies on:

(a) *Malacca Securities Sdn Bhd v Loke Yu* [1999] 6 MLJ 112; and

(b) *Amanah Finance Malaysia Bhd v Aura Vista Sdn Bhd & Ors* [2000] 5 CLJ 229.

I accept that these two cases support the position taken by learned counsel. In *Malacca Securities*, the learned judge held (at pp 124–125):

> It is therefore my view that the exercise of the power conferred by para 12 depends on the existence of rules contemplated by its proviso as any order made without any rules to that effect would be ineffectual as it cannot be carried out. The language employed in the proviso also supports this conclusion. The use of the word 'shall' in the proviso gives it a mandatory effect. The use of the word 'provided' to introduce the proviso is also significant. As *Black's Law Dictionary* (6th Ed) says this word ordinarily '... signifies or expresses a condition'. In the premises it is my view that the rules contemplated by the proviso constitute a condition precedent to the exercise of the power conferred by para 12. Thus in the absence of any rules having been made the power conferred by the paragraph cannot be exercised.

However, with respect, I take a different view. In my judgment, by virtue of para 12 of the Schedule, I have the power to grant the application to transfer the proceedings from this court to the High Court of Kuala Terengganu, regardless of the fact that, other than the Rules of the High Court 1980, there are, presently, no rules of court regulating the exercise of such power. I have carefully examined para 12, however, I fail to see in what way the absence of such rules of court precludes this court from exercising the power granted by this paragraph. To my mind, para 12 is a simple, clear and straightforward provision: a High Court is empowered to transfer a proceedings to any other High Court, and the exercise of such power to transfer the proceedings is only subject to the rules of court, if there are any such rules. What the proviso means is merely that if there are rules of court in existence regulating the exercise of the power conferred by para 12, then, the exercise of the power must be in accordance with such rules. The proviso does not say, nor can it be implied, that if there are no such rules then the power cannot be exercised. Thus, I do not find anything in the proviso that warrants an interpretation that if no rules of court are in existence then the court cannot exercise the power. I should add that if at all it is the intention of Parliament that the power to transfer under para 12 cannot be exercised unless and until there exists rules of court prescribing the manner of exercising such power, then, surely, clear words to that effect would have been inserted in the proviso. It is an illegitimate practice to read words into a statute that are not there, except, perhaps, in cases of manifest absurdity. Further, it is also significant to note that the proviso does not make it mandatory for the Rules Committee to make such rules; for the proviso merely states '... as may be prescribed ...'. The word 'may' is used by the proviso and not the word 'shall'. This fact also weakens any argument to the effect that there must be in existence special rules of court before the power could be exercised. With the greatest respect, I am unable to agree with the view that without any special rules of court an order of the court

pursuant to the exercise of the power under para 12 could not be carried out. In my judgment, there is nothing novel, unusual or complicated in exercising the power (so conferred by para 12) of transferring a case from a High Court to another High Court. It is axiomatic that the conferment of such a power is essential in the administration of justice. Cases where litigants file their cases at courts that are not the appropriate forums occur from time to time; and applications to transfer cases from one High Court to another are frequently made. It hardly needs stating here that all that the High Court hearing the application needs to do is to consider the application on its merits; and the principles on the issue of *forum non conveniens*, which the High Court judge will undoubtedly apply, are well established by case law authorities, and judges are well familiar with such principles. If the High Court judge considering the application is of the view that there is no merit in the application, then the application will be dismissed. If, on the other hand, the judge hearing the application is of the opinion that, based on the merits, the application should be allowed, then he would make an order that the proceedings be transferred to the other High Court named in the application (together with the necessary ancillary orders). Once such an order is made, the registrar of the court making the order will send the case file (together with the order of the court) to the registrar of the High Court to which the case is transferred, and the registrar of the latter court will register the case as if the action is filed in that High Court. The procedure is as simple as that. Strictly, there is no necessity for the existence of special rules of court for the purpose of the exercise of the power. The provisions of the Rules of the High Court 1980 are, in my view, sufficient to regulate the exercise of such a power. Of course, the Rules Committee may still make special rules if or whenever it considers necessary, for example, for the purpose of fine tuning the procedure or to overcome practical problems that might be encountered by the courts when exercising such power or to maintain some degree of uniformity in the exercise of the same. But it would be misinterpreting para 12 to say that the existence of special rules of court is a precondition to the exercise of the power under that paragraph.

I find support for the view that I take in the present case in *Surinder Singh v Central Government & Ors 1986* AIR SC 2166 and *Public Prosecutor v Seeralan* [1985] 2 MLJ 30 (both these cases were cited by the learned judge in *Malacca Securities*).

In *Surinder Singh*, Singh J held (at p 2169):

> Where a statute confers powers on an authority to do certain acts or exercise power in respect of certain matters, subject to rules, the exercise of power conferred by the statute does not depend on the existence of rules unless the statute expressly provides for the same. In other words framing of the rules is not condition precedent to the exercise of the power expressly and unconditionally conferred by the statute. The expression 'subject to rules' only means, in accordance with the rules, if any. If rules are framed, the powers so confirmed on authority could be exercised in accordance with these rules. But if no rules are framed there is no void and the authority is not precluded from exercising the power conferred by the statute.

In *Public Prosecutor v Seeralan*, Salleh Abas LP held (at p 34):

> The magistrate's power under para 26 of the Third Schedule of the Subordinate Courts Act to take cognizance of any contempt of court and to award punishment for the same is exercisable to 'such extent and in such manner as may be prescribed by rules of court'. Order XXXVIII r 1 of the Subordinate Courts Rules 1950 made provisions for the exercise of this power and Abdoolcader J (as he then was) held in *Re Kumarendran* that the rule applied to a contempt of court committed in the face of the court in respect of proceedings of a civil nature as well as or at best by analogy to those of a criminal nature because the rule is 'a statutory crystallization of an established principle of law'. However, when the Subordinate Courts Rules 1980 came into effect replacing the 1950 Rules, the provisions of O XXXVIII r 1 of the 1950 Rules were not retained. There is, therefore, no provision in the present Subordinate Courts Rules regarding the exercise of this power by the magistrate either in respect of civil proceedings or criminal proceedings. In our view the absence of such provision in the rules of court does not mean that the power cannot be exercised.

It is further submitted by the plaintiff's counsel that even assuming this court has the power to hear the defendant's application, nevertheless, the application ought to be dismissed on the grounds that the High Court of Kuala Terengganu is not the appropriate forum to adjudicate on the plaintiff's claim as it was the High Court of Kuala Terengganu that had previously made the receiving and adjudicating order against the plaintiff in the bankruptcy proceedings. With respect, this argument must be rejected because the plaintiff, in her affidavit opposing the present application, has never raised this issue.

On the facts of the present case, namely:

(a) that the plaintiff has an address of service in Dungun, Terengganu;

(b) that the defendant, a financial institution, has a branch office in Kuala Terengganu;

(c) that the basis of the plaintiff's claim is the defendant's bankruptcy proceedings against the plaintiff and that such proceedings were instituted by the defendant in the High Court of Kuala Terengganu; and

(d) that the witnesses that will be called by the defendant at the trial will be from Terengganu.

I am of the view that there is merit in this application. Therefore, there shall be order in terms.

Order accordingly.

Reported by Peter Ling